No. 87-527 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROMEO V. CENTENO AND BRUCE A. COANE, PETITIONERS

v.

GEORGE P. SHULTZ, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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11 pp

TABLE OF AUTHORITIES

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Petitioners contend that the court of appeals erred when it held that their First Amendment right of association did not entitle them to judicial review of a consular officer's decision denying petitioner Centeno a nonimmigrant visa to enter the United States. They also assert that the court of appeals' decision is in conflict with various lower federal court decisions.

1. Petitioners Centeno and Coane are citizens of the Philippines and the United States, respectively, and are brothers-in-law, through Coane's marriage to Centeno's sister. On April 1, 1986, Centeno applied for a nonimmigrant visa to visit the United States. A consular officer at the United States Embassy in Manila denied the application. Pet. App. 2a.

When Coane later inquired why the visa had been denied, a consul at the Embassy advised Coane that Centeno had failed to qualify under Section 214(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1184(b). The consul explained that under Section 214(b) applicants bear a burden to prove "that they have

residences abroad they have no intention of abandoning and that they seek to enter the United States temporarily." The consul stated that Centeno had not carried that burden of proof, noting that "he was not currently in school or employed; that he had no family ties strong enough to compel his return after visiting the United States; and that Mr. Centeno had never travelled outside of the Philippines." The consul observed that Centeno's ineligibility was "not permanent and may be overcome by submission of additional evidence." She invited Centeno "to reapply at anytime." Pet. App. 2a; C.A. App. 133-134.

2. Petitioners thereafter filed a complaint alleging that the denial of the visa to Centeno was unlawful, in part because it violated Coane's First Amendment right to associate with his brother-in-law (Pet. App. 2a). The district court dismissed the complaint (*id.* at 5a-7a). It noted (*id.* at 6a) that "the exhibits attached to [petitioners'] complaint indicate that the appropriate officials asserted numerous facially legitimate and bona fide reasons for the decision to deny this visa application." Relying on this Court's decision in *Kleindienst* v. *Mandel,* 408 U.S. 753 (1972), the district court concluded (Pet. App. 6a) that it would "not look behind th[e] [officials'] reasons nor balance them against * * * Coane's claimed first amendment interests."

3. The court of appeals unanimously affirmed (Pet. App. 1a-3a), holding that the consul's denial of a visa to Centeno was not subject to review by a federal court. It reasoned (*id.* at 2a) that "[w]here the statute under which the alien is excluded provides for a waiver of exclusion, the denial of the waiver is subject to only a minimal review by federal courts"—specifically, a review "limited solely to the determination of whether a facially legitimate and bona fide reason exists for the denial of the waiver." The court explained, however, that Centeno had been denied a

visa under 8 U.S.C. 1184(b), "which does not provide for a waiver" (Pet. App. 2a-3a). Accordingly, it held, the visa denial was not subject to judicial review.

4. a. The terms and conditions under which aliens may enter the United States, as visitors or as immigrants, are set forth in the Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. IV) 1101 *et seq.* (Immigration Act or Act). The Act is administered jointly by the Attorney General, the Secretary of State, and United States consular officers abroad. 8 U.S.C. 1103, 1104.

With exceptions not relevant here, no alien may enter the United States without first having applied for and obtained an immigrant or nonimmigrant visa. See 8 U.S.C. 1181(a), 1182(a)(26). Nonimmigrant visas are issued to aliens seeking temporary admission into the United States for one or more of the purposes specified in 8 U.S.C. (& Supp. IV) 1101(a)(15). Pursuant to 8 U.S.C. 1184(b), however, "[e]very alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, * * * that he is entitled to a nonimmigrant status under section 1101(a)(15) of this title." The alien has "the burden of proof * * * to establish that he is eligible to receive such visa * * * or is not subject to exclusion under any provision of [the Act]" (8 U.S.C. 1361).[1]

b. The authority to grant or deny nonimmigrant visas is assigned to consular officers (8 U.S.C. (& Supp. IV) 1201, 1202), and no visa may be issued if the consular officer "knows or has reason to believe" that the applicant is ineligible to receive a visa under the Act (8 U.S.C. 1201(g)). In the present case, a consular officer in Manila

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[1] Any alien may apply or reapply for a visa at any time, and each visa application is given independent consideration by the consular officer on the basis of the facts and circumstances known at the time of the particular application. See 22 C.F.R. 41.90.

determined that petitioner Centeno had not overcome the presumption under 8 U.S.C. 1184(b) that he was an intending immigrant and concluded accordingly that Centeno was not entitled to a visitor's visa to come to the United States.

The court of appeals correctly held that the consul's decision was nonreviewable, even in the face of a putative First Amendment claim.[2] "[I]t has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review" (*Li Hing of Hong Kong, Inc.* v. *Levin,* 800 F.2d 970, 971 (9th Cir. 1986)). Accord *Ventura-Escamilla* v. *INS,* 647 F.2d 28, 30-31 (9th Cir. 1981); *Wan Shih Hsieh* v. *Kiley,* 569 F.2d 1179, 1181 (2d Cir.), cert. denied, 439 U.S. 828 (1978); *Castaneda-Gonzalez* v. *INS,* 564 F.2d 417, 428 n.25 (D.C. Cir. 1977); *Rivera de Gomez* v. *Kissinger,* 534 F.2d 518, 519 (2d Cir.), cert. denied, 429 U.S. 897 (1976). As the Ninth Circuit explained in the *Li Hing* case (800 F.2d at 970), "[t]he doctrine of nonreviewability of a consul's decision to grant or deny a visa stems from the Supreme Court's confirming that the legislative power of Congress over the admission of aliens is virtually complete." See also *Lem Moon Sing* v. *United States,* 158 U.S. 538, 547 (1895).

c. Petitioners do not dispute "the doctrine of nonreviewability of a Consul's decision to grant or deny a visa" (*Ventura-Escamilla* v. *INS,* 647 F.2d at 30), and they do not deny that the court of appeals applied that doctrine in the present case. They contend, however, that this Court's decision in *Kleindienst* v. *Mandel,* 408 U.S. 753 (1972), has relaxed that doctrine. As petitioners put it

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[2] Petitioner Centeno personally, "as an unadmitted and nonresident alien, ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise." *Kleindienst* v. *Mandel,* 408 U.S. 753, 762 (1972). Accord *Galvan* v. *Press,* 347 U.S. 522, 530-532 (1954); *United States ex rel. Turner* v. *Williams,* 194 U.S. 279, 292 (1904).

(Pet. 10-11), the *Kleindienst* case "requires the Executive to give a facially legitimate and bona fide reason whenever a visa is denied, and allows a federal court to in fact determine if a given reason is facially legitimate and bona fide." That contention is meritless for two reasons.

First, the *Kleindienst* case casts no doubt on the general proposition that a consul's denial of a visa is nonreviewable. In *Kleindienst* the plaintiffs challenged a decision by the Attorney General not to grant a waiver of ineligibility to Ernest Mandel, a self-described "revolutionary Marxist." Mandel had been found to be ineligible to receive a visa under Section 212(a)(28)(D) of the Immigration Act, 8 U.S.C. 1182(a)(28)(D), because of his Marxist beliefs. Under Section 212(d)(3) of the Act, 8 U.S.C. 1182(d)(3), however, that ineligibility can be waived by the Attorney General, upon a recommendation by the Secretary of State or a consular officer, thus permitting the alien to enter the United States temporarily. Mandel had been invited to address various academic groups, and plaintiffs asserted a First Amendment right to hear his views. Although this Court agreed that "First Amendment rights [were] implicated" (408 U.S. at 765), it rejected plaintiffs' claim. The Court did not, however, reach the question whether the "First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced" (*id.* at 770). Instead, the Court found a narrower ground on which to reject plaintiffs' claim: because the Attorney General had refused to waive the ineligibility "on the basis of a facially legitimate and bona fide reason," the Court refused to "look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant" (*ibid.*). Having expressly declined to reach the broader issue of complete nonreviewability, however, the *Kleindienst* case plainly does not

contradict the settled principle "that the judiciary will not interfere with the visa-issuing process" (*Wan Shih Hsieh* v. *Kiley*, 569 F.2d at 1181).[3]

But even if the *Kleindienst* case requires the government to present facially legitimate grounds for its denial of a visa, the government clearly carried that modest burden in this case. As the district court concluded, and as petitioners make no effort to dispute, the consul in Manila denied Centeno a visa because he had failed to overcome the presumption of immigrant status under 8 U.S.C. 1184(b). The consul noted (see C.A. App. 133-134) that because of his lack of (1) employment, (2) significant family ties, and (3) prior travel experience, Centeno's visa application simply did not warrant a finding that he would

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[3] None of the court of appeals' decisions on which petitioners rely contradict the nonreviewability principle. Indeed, the District of Columbia Circuit in *Castaneda-Gonzalez* v. *INS*, 564 F.2d 417 (1977), recognized that a consular officer could exclude an alien under a particular section of the Immigration Act "without fear of reversal since visa decisions are nonreviewable" (564 F.2d at 428 n.25). To be sure, that court noted in dicta (*ibid.*) that under the *Kleindienst* case "when constitutional rights of American citizens are implicated, [the] government may be required to show [a] 'facially legitimate and bona fide reason' for refusal of visa." But the court did not embrace that broad reading of *Kleindienst* in its disposition of the merits. Similarly, while the court of appeals in *Wong* v. *Department of State*, 789 F.2d 1380 (9th Cir. 1986), did agree to review a consular official's *revocation* of a visa, the Ninth Circuit made clear more recently in the *Li Hing* case that *Wong* does not authorize judicial review of a consul's decision to grant or deny a visa. See 800 F.2d at 971. And the District of Columbia Circuit did not expressly address the question of consular nonreviewability in its decision in *Abourezk* v. *Reagan*, 785 F.2d 1043 (1986), aff'd by an equally divided Court, No. 86-656 (Oct. 19, 1987); that case turned instead on the construction of the Immigration Act. See 785 F.2d at 1051 n.6.

"return after visiting the United States."[4] Those reasons were plainly sufficient to justify the denial of the visa.[5]

d. In any event, this case is an inappropriate vehicle for departing from the principle of nonreviewability of consular visa denials. Petitioners assert a generalized First Amendment right to association that purportedly entitles them to second-guess the judgment of the consul in Manila. A like claim can no doubt be made in the vast number of visa applications involving family members overseas. But as the Court explained in the *Kleindienst* case (408 U.S. at 768-769), involving the Attorney General's waiver authority, such a "First Amendment argument would prove too much":

> Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien * * *, one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience's interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard.

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[4] Petitioners point to nothing in the record to support their assertion (Pet. 5, 9) that Centeno was denied a visa based on his inability to speak English.

[5] Because the Consul provided facially legitimate reasons for the denial of the visa, petitioners' reliance on the district court decisions in *Harvard Law School Forum* v. *Shultz*, 633 F. Supp. 525 (D. Mass. 1986), vacated as moot, No. 86-1371 (1st Cir. June 18, 1986), and *Allende* v. *Shultz*, 605 F. Supp. 1220 (D. Mass. 1985), is misplaced.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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